

## Saskowski, Ronald

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**From:** Smith, Stephen  
**Sent:** Wednesday, January 21, 2015 2:49 PM  
**To:** McCall, Carolyn; Strickland, Ray; Snow, Jim; Jardine, Rick; Patel, Subash; Newman, Keriema  
**Cc:** Palmer, Leif; Davis, Anita; Taylor, Matt; 35AveSiteFile; Forsythe, Davis (ENRD); Campbell, Richard; Saskowski, Ronald  
**Subject:** FW: 35th Avenue Superfund Site Listing Proposal  
**Attachments:** USP Comment Letter re 35th Avenue 20150120.pdf

FYI - Attached is a letter by Les Oakes who represents U.S. Pipe providing their comments to the proposed listing at 35th Avenue. The letter is properly directed to the docket coordinator in DC.

Richard/Ron – Can you please place the below email and attachment in SEMS for the 35th Avenue Superfund Site?  
Thanks so much.

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Stephen P. Smith  
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**From:** Oakes, Les [<mailto:LOakes@KSLAW.com>]  
**Sent:** Wednesday, January 21, 2015 2:37 PM  
**To:** Smith, Stephen  
**Cc:** Jeffrey McClellan ([jmcclellan@muellerwp.com](mailto:jmcclellan@muellerwp.com)); McCullers, Stephen  
**Subject:** 35th Avenue Superfund Site Listing Proposal

Stephen, attached is your copy of the above-referenced letter. The original was submitted electronically to the EPA docket for this Site.

Les Oakes  
King & Spalding  
404-572-3314

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January 20, 2015

## **Via Regular Mail and Electronic Submission**

Docket Coordinator, Headquarters  
U.S. Environmental Protection Agency  
CERCLA Docket Office  
Mailcode 5305T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**Re: Docket ID No. EPA-HQ-SFUND-2014-0623  
Proposed NPL Listing of the 35th Avenue Site, Birmingham, AL**

Dear Sir or Madam:

On behalf of U.S. Pipe (“USP”), I am submitting these comments for consideration in connection with the proposed NPL listing for the 35th Avenue Site in Birmingham, AL (the “Site”). USP opposes adding the Site to the NPL for several reasons. First, EPA’s selections of background samples for arsenic and benzo-a-pyrene (“BaP”) were inappropriate, resulting in an inaccurate and inflated HRS score. Second, EPA provides no evidence that would attribute the alleged contamination at the Site to USP’s former operations. And finally, EPA’s decision to propose the Site for listing is arbitrary and capricious and not supported by credible scientific evidence. For these reasons, EPA has failed to meet the requirements of the National Contingency Plan and the agency’s own guidance, and EPA should withdraw the proposal to list the Site.<sup>1</sup>

### **I. EPA’s Chosen Background is Inappropriate**

EPA’s HRS calculations are inaccurate because EPA used inappropriate “background” samples for comparison purposes for the hazardous substances of concern,

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<sup>1</sup> See Memorandum from David Evans, Director, EPA State, Tribal & Site Identification Center, to Site Assessment Managers and NPL Coordinators (Nov. 12, 2002), *available at* <http://www.epa.gov/superfund/sites/npl/hrsres/policy/dprop.pdf>.

arsenic and BaP. EPA's HRS score for the Site is based solely on the soil exposure pathway. Under this pathway, sample concentrations are considered to indicate "observed contamination" if the sample concentration exceeds three times its corresponding background level.<sup>2</sup> Thus, any error by EPA in selecting the appropriate background values for either arsenic or BaP is magnified considerably when determining which samples at the Site exhibit "observed contamination." The error is further exacerbated by the resident population threat category of the HRS formula, which is based on the number of allegedly contaminated samples within 200 feet of a residence. Consequently, selecting incorrect background concentrations can greatly skew the final HRS score.

As explained below, EPA did not select appropriate background samples for arsenic and BaP. To establish background levels for the Site, EPA analyzed surface soil samples from the Robinwood neighborhood. This neighborhood, however, does not provide a representative background against which to compare the Site. First, EPA selected a background site with dissimilar soils and used different sampling methods in the background sampling area. Second, EPA ignored many other sources of background data, which would have established higher background concentrations of contaminants as compared to EPA's selected background values. Moreover, EPA did not explain why other sources of conflicting background values were not selected. Finally, sampling from Robinwood consisted of a much lower percentage of samples from within the floodplain. In sum, the Robinwood samples were anything but similar to the Site samples.

These errors resulted in an inflated HRS score. As discussed in the Technical Review of EPA's HRS Analysis submitted by NewFields,<sup>3</sup> the properly calculated HRS score is below 28.5. Thus, the Site should not be added to the NPL.

#### **A. EPA Selected Dissimilar Soils and Failed to Use Consistent Sampling Methods**

For comparison purposes, the selection of background samples "should be as similar as possible" to Site samples.<sup>4</sup> Furthermore, not only must the background samples have the same characteristics as the Site, the collection of samples between the

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<sup>2</sup> EPA, Hazard Ranking System Guidance Manual (Nov. 1992).

<sup>3</sup> USP refers EPA to the NewFields' Technical Review of EPA's HRS Analysis of the Site, which has been submitted to the public comment docket under separate cover, for a more thorough explanation of this calculus. NewFields' Technical Review is incorporated by reference as if fully set forth herein.

<sup>4</sup> EPA, Hazard Ranking System Guidance Manual, 58 (Nov. 1992), *available at* <http://www.epa.gov/superfund/sites/npl/hrsres/hrsrgm/ch5.pdf>.

two locations must be the same. EPA, however, did not follow these requirements which the agency established for itself to follow.<sup>5</sup>

First, all Robinwood background samples were light-brown to medium-brown in soil color. These samples were not similar to the Site samples which were dark gray or black. Second, EPA used different sampling depths for the background samples and the Site samples. In Robinwood, the sampling depth was 0 to 6 inches below the ground surface. In contrast, sampling at the Site was at a depth of 0 to 4 inches below the surface. Thus, because EPA's primary theory of contamination is air deposition, the Robinwood samples are diluted by as much as 33% when compared to the Site samples. In addition, since the soil exposure pathway assumes human contact with the sample, taking a background sample from a deeper soil horizon creates a different potential for exposure.

Finally, EPA made a number of sampling decisions for the Robinwood properties that were not replicated at the Site. In the Robinwood neighborhood, EPA excluded properties or moved sampling locations based on property characteristics. For example, EPA avoided structures on twelve properties; avoided areas of perceived impacts related to the presence of oil stains or abandoned material on twelve properties; avoided roads on four properties; and avoided open areas on seven properties. Additionally, EPA excluded at least three properties entirely, one of which (WC08) was rejected because coal fragments were found in the soil.<sup>6</sup>

Consequently, the Robinwood samples were not similar to the Site samples because they involved a different soil type and EPA did not use the same sampling methodology at both locations. Thus, the Robinwood samples should not have been used for background comparison.

## **B. EPA Ignored Other Background Data Sources**

EPA's selection of the Robinwood neighborhood for background comparison fails to consider other widely available sources of background data. Both the U.S. Department of Energy and the U.S. Geological Survey have developed and widely published regional soil background data in the vicinity of the Site.<sup>7</sup> Instead of considering these sources, however, EPA limited the background comparison to twenty-one properties from the Robinwood neighborhood. Furthermore, EPA provided no discussion of why these other, reliable background data sources were not considered.

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<sup>5</sup> Furthermore, it is not evident that EPA's Robinwood Study was even intended to be used to support EPA's HRS score calculation. *See Newfields' Technical Review.*

<sup>6</sup> *See Newfields' Technical Review.*

<sup>7</sup> *See Newfields' Technical Review.*

### **C. EPA's Selected Background Site has a Much Lower Percentage of Floodplain Samples**

In addition to air deposition, EPA states that flooding is another source of possible contamination of soil at the Site. The samples taken from the Robinwood neighborhood, however, are not similar to the Site because a much lower percentage of samples were taken from a floodplain. For the Robinwood samples, only 2 out of 21 properties—or 9.5%—were collected in the floodplain. In contrast, a much higher percentage—nearly 50%—of the sampled Site properties were allegedly collected within the floodplain. If, as EPA asserts, flooding was a mechanism by which soils at the Site became contaminated, then the agency should have selected a location that is similar to the Site properties in terms of flood frequency and location in the floodplain. The “background” samples from the Robinwood neighborhood, however, are dissimilar to the Site in this regard and are not appropriate for comparison.

In sum, EPA erred in selecting the Robinwood neighborhood for background samples. EPA also erred in failing to explain why the hundreds of other published values for arsenic and BaP in soils in the vicinity of the Site were not adopted. As discussed in NewFields’ Technical Review, when a correct background value is used, the HRS score is lower than 28.5. Thus, the Site should not be added to the NPL.

## **II. EPA's Attribution of Site Contamination to USP is Arbitrary and Capricious**

USP objects to EPA’s attribution conclusion that USP is responsible for some of the alleged contamination at the Site. EPA provides no evidence for its attribution. On numerous occasions, including at least three prior letters, USP asked EPA for credible evidence demonstrating a nexus between USP’s former operations and the alleged Site contamination.<sup>8</sup> EPA, however, never provided any such evidence. Furthermore, EPA has never explained—despite recognizing that the area was home to as many as 77 different industrial facilities—why it selectively targeted only a few potentially responsible parties as causing the alleged contamination at the Site. Now in the HRS documentation, EPA has also failed to provide any evidence to support attribution to USP.

Attribution “generally involves demonstrating that the hazardous substance used to establish an observed release can be associated with the site, and the site contributed at least in part to the significant increase in the concentration of the hazardous substance.”<sup>9</sup>

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<sup>8</sup> See Letters from Les Oakes, Attorney for Mueller Water Products, to Marianne Ortiz Lodin, Associate Regional Counsel, EPA Region 4 (Oct. 22, 2013; Jan. 3, 2014; Jan. 31, 2014) (attached as Exhibits 1 through 3 respectively).

<sup>9</sup> EPA, HRS Guidance Manual, 55 sec. 5.1, *available at* [http://www.epa.gov/superfund/training/hrstrain/htmain/sec\\_5\\_1.htm](http://www.epa.gov/superfund/training/hrstrain/htmain/sec_5_1.htm).

Instead of making this demonstration, EPA relied on the general proposition that foundries “can contribute to the deposition of contamination in the area by air emissions of ... lead [and] BaP, both through gaseous emissions and PAHs absorbed onto dust.”<sup>10</sup> HRS Documentation at 43.

This explanation, however, is wholly inadequate. As discussed in more detail below, EPA failed to describe how any alleged contaminants produced at the USP facility migrated off-site. Thus, EPA’s claimed attribution to USP is arbitrary and capricious because it is not based on facts in the record.

**A. USP is Only Responsible for Operations Occurring between 1995 and 2010**

The pipe facility at 3000 30th Avenue North operated in various configurations and under different owners from the early 1900s to 2010. USP’s control over the historic industrial activities at the location, however, represents only a small fraction of this period.

In 1989, the operator of the Site, Walter Industries, Inc., filed for bankruptcy protection. In March 1995, USP came into existence at the conclusion of these bankruptcy proceedings.<sup>11</sup> USP assumed operation of the pipe facility from that time to June 2010, when it ceased all operations at the facility. Shortly thereafter, USP began demolishing the pipe facility, which was completed in April 2012. Thus, USP could only be responsible for alleged contamination emanating from the facility to the Site via airborne deposition between 1995 and 2010, but EPA’s claim in that regard is highly suspect, as explained below.

**B. USP Operated Pursuant to Air Quality Control Permits**

While EPA states that air deposition is the primary source of contamination at the Site, it does not provide any air dispersion modeling to show how deposition from the pipe facility occurred. EPA requested, and USP provided, extensive data regarding USP’s operations and air emissions. Yet, there is no evidence that EPA ever ran any air dispersion modeling. Rather, EPA states that aerial deposition at the Site is shown by the uneven distribution of contamination combined with the fact that there is “considerable wind variability in the area.” HRS Documentation at 50. This flimsy connection,

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<sup>10</sup> Two of the three references EPA relied on for this statement, however, do not support EPA’s conclusion because they only concern potential BaP and PAH exposure to foundry workers, which is an entirely different exposure scenario than potential off-site impacts. *See* References 108 and 109.

<sup>11</sup> USP provided evidence of the 1995 bankruptcy to EPA. *See* Email from Les Oakes, King & Spalding, to Marianne Ortiz Lodin, Associate Regional Counsel, EPA Region 4 (Jan. 20, 2014).

however, cannot act as a substitute for an air dispersion model nor provide even rudimentary evidence for attribution.

In USP's experience, EPA, ADEM and Jefferson County are all familiar with computer air dispersion models. One of the most commonly used models, EPA's AERMOD, calculates estimated ground level concentrations on an hour-by-hour basis using five years of meteorological data from both surface and upper air measuring locations. During a five-year period, winds blow from all directions and at varying speeds. Had EPA's Superfund personnel conferred with their colleagues who perform air dispersion modeling, the agency would never have provided such an unsubstantiated basis for asserting a claim that air emissions from the former USP plant may have impacted the Site by air deposition.

Likewise, EPA claims that data from three ambient monitors supports the agency's conclusion that airborne deposition from the selected PRP's caused contamination at the Site. The proposed listing, however, fails to connect emissions from any source to the data that was apparently collected at the monitors. Had EPA run an air dispersion model to support its purported listing decision, the agency might have been able to substantiate its attribution claims.<sup>12</sup> On the evidence in this record, it is as likely that the hazardous substances observed in the Jefferson County monitors may have come from emissions sources located hundreds of miles away rather than from one of the 77 industries located near the Site.

Furthermore, for the relevant time period of 1995 to 2010, USP's air emissions were subject to federal and state regulation and permitting by the Jefferson County Department of Health under Alabama's federally-approved State Implementation Plan. The permits and regulations required USP to install and operate air pollution control devices, such as baghouses, and USP installed and operated those controls throughout its entire operating history. In the HRS documentation, however, EPA does not describe how the regulation of USP's air emissions was inadequate or how the regulated and well-controlled emissions contributed to the alleged contamination of the Site. Additionally, any excess emissions from USP's operations may have been excused by the Jefferson County and ADEM regulations.

Finally, we note that the North Birmingham air monitoring station near the former USP facility is *upwind* of the plant. See HRS Documentation at 18. Had EPA performed an air dispersion model, the agency might be able to exclude USP or other suspected sources of air emissions from impacts at this location. On this record, the data from that monitor is of no value for attribution to USP.

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<sup>12</sup> USP knows that EPA collected information from which a computer dispersion model could be run on the basis of the agency's Section 104(e) Information Request dated June 12, 2013.

For these reasons, USP concludes that EPA failed to establish any connection between its former plant's air emissions and the alleged Site contamination.

### **C. USP Disposed of Wastes Off-site**

In addition to alleged smokestack emissions, EPA generally identifies "windblown particles from process fines and other stockpiled material" as a source of Site contamination. HRS Documentation at 16. Specific to the pipe facility, EPA stated that baghouse dust was disposed of in a landfill on the facility's property; the implication being that windblown contaminants migrated from the landfill to the Site.

USP's landfill, however, was closed in 1989, six years before USP came into existence. Furthermore, beginning in 1988, the facility "began operating a totally enclosed treatment system for its baghouse dust [and] disposed of [the dust] at an off-property permitted landfill." HRS Documentation at 48. Thus, during the entire time USP operated the facility, the facility's dust and waste were not subject to transportation by wind. EPA failed to provide a theory, much less any evidence, for how particles could have migrated from the facility property to the Site during the relevant time period of 1995 to 2010.<sup>13</sup>

In summary, EPA failed to provide any evidence for attributing the alleged contamination of the Site to USP. EPA's attribution is based solely on two assertions: that USP operated a foundry near the Site; and that foundries may produce contaminants. Such unsubstantiated conclusions, however, are insufficient to support EPA's attempt at "attribution." Rather, because EPA's attribution to USP of the alleged contamination is not based on facts in the record, it is arbitrary and capricious.

### **III. EPA's Reason for Listing the Site is based on an Improper Motive**

Adding the Site to the NPL is also arbitrary and capricious because it is motivated by an improper reason—a desire to put pressure on PRPs to participate in remediation activities. In an email to the Director of the Alabama Department of Environmental Management, the EPA Region 4 Administrator stated that EPA's "top priority should continue to be bringing as many resources to bear" as possible on the situation and that listing the Site would "send[] a strong signal to the ... PRPs."<sup>14</sup> EPA's desire to pressure PRPs to action, however, is not a legitimate reason for listing a Superfund site. *See* 40 C.F.R. § 300.425(c) (providing the methods for determining if a site is eligible for the

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<sup>13</sup> We also note that EPA recently found that spent foundry sand, such as the sand that could have been airborne from the former landfill, is safe to use in various applications and that EPA even encourages using it in potting soil. EPA et al., *Risk Assessment of Spent Foundry Sands in Soil-Related Applications* (Oct. 2014), available at [http://epa.gov/epawaste/conserve/imr/foundry/pdfs/sfs\\_530r14003.pdf](http://epa.gov/epawaste/conserve/imr/foundry/pdfs/sfs_530r14003.pdf).

<sup>14</sup> Email from Heather McTeer Toney, EPA Regional Administrator, Region 4, to Lance LeFleur, Director, Alabama Department of Environmental Management (Oct. 1, 2014) (attached as Exhibit 4).




NPL). Thus, EPA's reason for listing the Site is contrary to its own regulations governing NPL listings.

USP acknowledges that the Site is not a "typical" Superfund site, but with that acknowledgement, USP expects that EPA would do more, not less, to show a connection between its former plant and the alleged soil contamination that is supposed to justify inclusion on the NPL.<sup>15</sup> As ADEM notes in its comments on the proposed listing, "the Agency for Toxic Substances and Disease Registry (ATSDR) conducted a health consultation which found no significant health risks due to soil and air exposures at the Site."<sup>16</sup> Against this additional hurdle, what EPA is proposing is unjustified and must be withdrawn.

#### IV. Conclusion

There is no basis for EPA to add the Site to the NPL. As explained above, EPA has failed to meet the requirements of the National Contingency Plan and the proposal to list the Site should be withdrawn.

Sincerely,



Les Oakes

cc: Mr. Stephen Smith  
Mr. Jeff McClellan

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<sup>15</sup> In fact, in situations like this where there are multiple potential sources in the vicinity of the site being evaluated; EPA's own guidance contemplates additional investigation in order to "strengthen" attribution, including the use of analytical fingerprinting to connect the alleged contamination to a specific source. EPA, HRS Guidance Manual, 59-61, *available at*

<http://www.epa.gov/superfund/sites/npl/hrsres/hrsgm/ch5.pdf>.

<sup>16</sup> Letter from Lance R. LeFleur, Director of the Alabama Department of Environmental Management, to U.S. EPA Docket Coordinator, CERCLA Docket Office, 2 (Jan. 13, 2015).

**Exhibit 1**

**Letter from Les Oakes, King & Spalding LLP, to  
Marianne Ortiz Lodin, Associate Regional Counsel, EPA  
Region 4**

**(Oct. 22, 2013)**

# KING & SPALDING

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October 22, 2013

## FOR SETTLEMENT PURPOSES ONLY

### VIA EMAIL

Marianne Lodin  
Associate Regional Counsel  
United States Environmental Protection Agency  
Region 4  
61 Forsyth Street  
Atlanta, Georgia 30303-8960

### RE: 35<sup>TH</sup> AVENUE SUPERFUND SITE

Dear Ms. Lodin:

I writing in response to the letter dated September 20, 2013, from James Webster concerning the above-referenced Superfund Site. The letter requested a response within 14 calendar days. As you and I discussed, the original deadline for a response would have been October 4, 2013; however, the intervening closure of the federal government effectively extended that deadline. You and I subsequently spoke last week and agreed that Mueller Water Products could respond on behalf of U.S. Pipe this week.

While the September 20<sup>th</sup> letter is unclear as to the United States Environmental Protection Agency's (EPA) expectations, in our telephone conversations, you indicated that the Agency was looking for an expression of interest to attend a meeting to discuss the possible implementation of the remediation of the fifty properties that is described in the letter in general terms. As I stated last week, this letter confirms that U.S. Pipe representatives are willing to attend such a meeting with EPA. At that meeting, the U.S. Pipe representatives hope to learn more about the scope of the work described in the September 20<sup>th</sup> letter, any understanding of the cost of the work which EPA may be able to share and a review of the methodology of the legal framework under which EPA would expect the work to be completed (e.g., an Administrative Order on Consent). The U.S. Pipe representatives also anticipate receiving information at the meeting

Marianne Lodin  
October 22, 2013  
Page 2

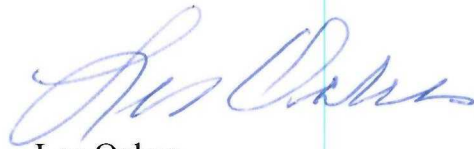
documenting that contamination above EPA's defined "action levels" exists on the designated properties. U.S. Pipe understands that EPA has sampled 1100 properties, but to date, U.S. Pipe has not received any of the results. Please consider this letter a request, pursuant to the Freedom of Information Act, for copies of those data and the information necessary to identify the locations that were sampled.

Finally, and most importantly, the U.S. Pipe representatives need to understand the basis for EPA asserting that it has any legal obligation pursuant to the Comprehensive Environmental Response, Compensation and Liability Act to undertake the remediation requested in the September 20 letter. As you may know, the U.S. Pipe manufacturing facility near 35<sup>th</sup> Avenue closed in 2010 and was subsequently demolished. Today there is no business activity conducted at that former plant site.

Please contact me to arrange a date and time for a private conversation to discuss EPA's basis for asserting that U.S. Pipe is a "responsible party" at the 35<sup>th</sup> Avenue Superfund Site. Please also inform me when the agency has established a date for a possible meeting with U.S. Pipe and other recipients of the September 20<sup>th</sup> letter to discuss EPA's plan of action and the other items raised in this letter.

I look forward to hearing from you.

Sincerely,



Les Oakes

LO:ab

cc: Jeff McClellan (via email)  
Greg Hollod (via email)

## **Exhibit 2**

**Letter from Les Oakes, King & Spalding LLP, to  
Marianne Ortiz Lodin, Associate Regional Counsel, EPA  
Region 4**

**(Jan. 3, 2014)**

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January 3, 2014

## **Via Electronic Transmission and U.S. Mail**

Marianne Ortiz Lodin  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
Office of Environmental Accountability  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Re: 35th Avenue Superfund Site, Birmingham, Jefferson County, AL

Dear Ms. Lodin:

I am writing concerning the above-referenced Superfund Site (the "Site"). As you know, my firm represents U.S. Pipe in this matter.

### **EPA's Demand**

On September 20, 2013, EPA informed U.S. Pipe and four other Potentially Responsible Parties (the "PRPs") of the agency's intention of performing a time-critical removal action at a group of residences at the Site. On November 20, 2013, EPA informed the PRPs that it had tentatively scheduled a meeting to take place at the EPA's Atlanta office on January 16, 2013. At that meeting, EPA promised to provide an overview of the removal action that is required, answer questions regarding the work, provide a timeline for next steps (including AOC negotiations) and would request that a PRP group representative be selected from among the five designated PRPs involved in the negotiations. The January 16<sup>th</sup> meeting would also start a three-week clock to conclude negotiations among the parties that would undertake the first phase of the anticipated removal action. EPA separately held a series of individual meetings with the five PRPs. U.S. Pipe's representatives met with EPA on December 19, 2013.

At the December 19th meeting, U.S. Pipe learned that only parties that were willing to negotiate in good faith to undertake the first phase of EPA's removal action

would be allowed to participate in January 16<sup>th</sup> meeting. U.S. Pipe also learned that EPA had, to date, spent approximately \$5 million at the Site and that EPA's estimated cost to complete the first phase of the removal action, which would correct conditions at 52 residences, was between \$2 to \$3 million. The second phase of the removal action, which would encompass another 350 residences, could cost approximately \$14 million. Ultimately, EPA believes that as many as 1,100 residences may need to be remedied. Finally, EPA said that it plans to commence the first phase of the removal action in February 2104.

### U.S. Pipe's Responses

*FOIA Request* – On February 5, 2013, U.S. Pipe filed a FOIA Request with EPA for information about the Site. On March 4, 2013, U.S. Pipe renewed its FOIA request as part of the company's initial response to EPA's December 28, 2012 information request. U.S. Pipe received the first set of responsive documents from EPA on December 20, 2013. On December 30, 2013, EPA acknowledged my client's prior requests FOIA requests. Without question, U.S. Pipe is disadvantaged by EPA's failure to respond to its FOIA request in a more timely fashion because my client still does not know who or how many parties EPA has queried about the Site, how many of the parties responded or whether any of the responses suggest that other parties may have liability at the Site. Without this information, U.S. Pipe is unable to determine whether other, credible PRPs may exist or whether those parties should be included in discussions with a PRP group or EPA. Likewise, without the requested information, if U.S. Pipe elects to perform EPA's demanded removal action, the company will be unable to determine if viable parties may exist from whom my client might recover any excess expenditures. Until U.S. Pipe receives and has a meaningful opportunity to review relevant information about the Site, including information about other PRPs, my client may be unable to agree to undertake the demanded removal action.

*U.S. Pipe's Alleged Liability* – The most disconcerting aspect of EPA's communications with my client is the lack of a credible connection between my client and a release of hazardous substances at the Site. On June 12, 2013, EPA demanded extensive information about my client's former plant's equipment configurations and air emission sources. U.S. Pipe responded to EPA's supplemental information request on September 13, 2103.

At the December 19<sup>th</sup> meeting, EPA confirmed that the requested supplemental information would be used to run the AERMOD computer dispersion model; however, prior to the meeting, EPA had not performed any dispersion modeling and could not present any results. U.S. Pipe is familiar with both the AERMOD computer dispersion model and the model's inherent limitations. At best, the model can be used to



approximate the possible impacts of air emissions sources, but since EPA has failed to run the model, neither the agency nor my client can conclude what the model might suggest about U.S. Pipe's or any other PRP's possible air emission impacts at the Site.

EPA also claimed that U.S. Pipe had operated for many years before air pollution controls were legally required and that those historic operations undoubtedly contributed to the presence of hazardous substances at the Site. EPA is incorrect. My client came into existence in 1995 as the results of the sale of assets in a bankruptcy proceeding. Consequently, anything that may have occurred prior to 1995 cannot be attributed to U.S. Pipe. Moreover, at all times after the 1995 sale, U.S. Pipe had air pollution permits issued pursuant to the federally-enforceable Alabama State Implementation Plan. U.S. Pipe also employed air pollution controls and was continuing to improve those controls until shortly before the plant was shuttered in 2010. EPA's claims about possible links between U.S. Pipe and releases of hazardous substances at the Site are therefore reduced to hypotheses. Before committing to spend millions of dollars, my client expects EPA to present a tangible demonstration of its alleged liability at this Site.

*Negotiation Period* – EPA has been working at the Site for more than two years, but EPA has set aside just three weeks for negotiations to undertake a multi-million dollar cleanup. Moreover, the PRPs will not have reviewed the agency's work plan or the AOC until the January 16 meeting. Simply reading and understanding those documents would take several days. In addition, if the negotiations with EPA yield an agreement to undertake the work, the performing PRPs will need time to raise funds to pay for the work, to hire a consultant and to have the consultant prepare the numerous EPA-required documents, such as a health and safety plan and a sampling and analysis plan. The performing PRPs will also need to hire contractors who can undertake the removal work in compliance with EPA and OSHA requirements (e.g., HAZWOPPER). U.S. Pipe believes that completing those activities will take months, but EPA expects the first phase of the removal work to begin in February. U.S. Pipe is concerned that EPA's timetable is unrealistic, and given the inclusion of stipulated penalties in a typical CERCLA administrative order, the timetable would unavoidably put a participating PRP at risk.

*Other PRPs* – At the December 19<sup>th</sup> meeting, EPA provided little insight into why or how it selected the five PRPs that received the September 20 demand letter. Based upon past experience, if EPA believes that the alleged liability of the five recipients is greater than the alleged liability of other PRPs, U.S. Pipe would have expected EPA to explain the bases for selecting the five identified PRPs from among the many parties to whom EPA has apparently sent information requests. EPA's decision to limit its initial demand to such a small group places the receiving PRPs at a disadvantage in future negotiations with other PRPs and makes raising the funds necessary to complete the first phase of the removal action more burdensome and more difficult.



Marianne Ortiz Lodin  
January 3, 2014  
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The January 16 Meeting

U.S. Pipe considers the time-critical removal action outlined in the September 20 letter to be a serious matter. U.S. Pipe recognizes the significant penalties that are available under CERCLA if my client is shown to be a responsible party that refused to act pursuant to EPA's direction as the agency's letter notes. For these reasons, U.S. Pipe plans to attend the January 16 meeting in spite of its concerns outlined above.

Following your review of this letter, please contact me to discuss its contents.

Sincerely,



Les Oakes

LO:ab

cc: Jeff McClellan

### **Exhibit 3**

**Letter from Les Oakes, King & Spalding LLP, to  
Marianne Ortiz Lodin, Associate Regional Counsel, EPA  
Region 4**

**(Jan. 31, 2014)**

# KING & SPALDING

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January 31, 2014

## **Via Electronic Transmission**

Marianne Ortiz Lodin  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
Office of Environmental Accountability  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Re: 35th Avenue Superfund Site, Birmingham, Jefferson County, AL

Dear Ms. Lodin:

I am writing concerning the above-referenced Superfund Site (the "Site"). On January 16, 2014, EPA met with representatives of U.S. Pipe and Walter Coke. These companies are two of the five entities to which EPA sent a special notice letter on September 20, 2013, concerning a time-critical removal action that EPA proposes be undertaken at approximately 50 of the residences that comprise a portion of the Site. Given the significant penalties for failing to respond to an EPA demand pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.* ("CERCLA"), U.S. Pipe has responded to EPA's notice by attending meetings and communicating with the agency via telephone, e-mails and letters. Nonetheless, for the reasons explained below, U.S. Pipe must respectfully decline EPA's offer to perform the contemplated removal action.

In a letter dated January 3, 2014, U. S. Pipe discussed at length the company's concerns about this Site and the proposed time-critical removal action.<sup>1</sup> U.S. Pipe will not repeat all of those concerns in this letter, but my client notes that EPA has failed to respond meaningfully to the company's questions and comments. In particular, EPA has repeatedly failed to provide substantive evidence that U.S. Pipe has caused or contributed

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<sup>1</sup> U.S. Pipe incorporates by reference its letter to EPA dated January 3, 2014, as if set out here in its entirety.

to the releases of hazardous substances that EPA's removal action is intended to remedy. As U.S. Pipe has explained to EPA at every opportunity since it received the September 20 notice letter, absent such evidence, the company is essentially being asked to volunteer to implement the removal action, and that is unquestionably an unreasonable demand.<sup>2</sup> EPA's regulations and internal procedures would prevent the agency from committing the government's resources in a similar circumstance.

Despite U.S. Pipe's repeated requests for hard evidence, EPA's only explanation occurred during the December 19, 2013 meeting when EPA offered vague statements about historic air pollution events and an air dispersion model that EPA has yet to run. In its January 3 letter, U.S. Pipe refuted those allegations, and at the subsequent meeting on January 16 and during our telephone conversation of January 24, 2014, EPA again declined to provide any additional information. EPA's failure to provide evidentiary support for the statement that it made in the September 20 letter that the agency "has determined that [U.S. Pipe] may be a responsible party under CERCLA" is the reason that my client must decline to participate further at this time. If EPA provides actual evidence in the future, U.S. Pipe reserves the right to revisit the issue of participating in the removal action following its review of the newly furnished information.

Finally, U.S. Pipe remains unclear about another important aspect of the Site. In the September 20 letter, EPA named U.S. Pipe, which has not operated for more than three years, as one of five potentially responsible parties ("PRPs") that it asked to undertake the proposed time-critical removal action. U.S. Pipe understands, however, that EPA had previously identified more than 60 PRPs, including several large manufacturing facilities that continue to operate in the North Birmingham area. EPA elected not to name most of those parties. Therefore, to single out U.S. Pipe, which closed years ago, and then to provide no evidentiary support for the agency's demand, is arbitrary and capricious to put it politely. If EPA intended for a group of PRPs to conduct the remedy at the Site, the agency seemingly would have done more to identify a critical mass of possible respondents and to provide evidence to the PRPs to support the allegations of their respective responsibilities. Given the agency's reluctance or refusal to do so has resulted in an entirely predictable result: EPA will implement the remedy.

Following your review of this letter, please feel free to contact me if you have questions or if EPA would like to share evidence of U.S. Pipe's alleged connection to the Site. U.S. Pipe also reiterates its previous FOIA requests. We understand that EPA has

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<sup>2</sup> U.S. Pipe's formal response has been delayed by the recent inclement weather that struck Atlanta, GA.

Marianne Ortiz Lodin  
January 31, 2014  
Page 3

additional documents about the Site, the remedy and the PRPs. U.S. Pipe looks forward to receiving that information.

Sincerely,



Les Oakes

LO:ab

cc: Jeff McClellan  
Greg Hollod  
Gary Rovner

## **Exhibit 4**

**Email from Heather McTeer Toney, EPA Regional  
Administrator, Region 4, to  
Lance LeFleur, Director, Alabama Department of  
Environmental Management**

**(Oct. 1, 2014)**

## LeFleur, Lance R

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**From:** LeFleur, Lance R  
**Sent:** Wednesday, October 01, 2014 4:27 PM  
**To:** 'McTeerToney, Heather'  
**Subject:** RE: 35th Ave. NPL Listing

Heather

Thank you for your follow up on our conversation earlier today. I want to make it clear that EPA misconstrued our letter of June 11, 2014. As I previously stated, a careful reading of the letter will confirm ADEM did not and does not conditionally, or otherwise, concur in the proposed listing of the 35<sup>th</sup> Avenue site on the NPL.

Lance

**From:** McTeerToney, Heather [mailto:McTeerToney.Heather@epa.gov]  
**Sent:** Wednesday, October 01, 2014 11:45 AM  
**To:** LeFleur, Lance R  
**Subject:** FW: 35th Ave. NPL Listing

Please see below. The previous email was incorrect.

All the best,  
Heather

**From:** McTeerToney, Heather  
**Sent:** Wednesday, October 01, 2014 12:43 PM  
**To:** 'LLfleur@ADEM.state.AL.US'  
**Cc:** Stanislaus, Mathy; Heard, Anne; Jenkins, Brandi; Feldt, Lisa; HicksWhite, Javoyne; KeyesFleming, Gwendolyn; Hill, Franklin; Chaffins, Randall  
**Subject:** 35th Ave. NPL Listing

Dear Lance,

It was a pleasure speaking with you today. On behalf of Administrator McCarthy, I am responding to your September 16, 2014, email regarding EPA's action to propose the 35<sup>th</sup> Avenue Site to the National Priorities List (NPL). EPA highly values the relationships we maintain with our state partners and recognizes that without these partnerships, success in the work we accomplish to protect human health and the environment is impossible. To that point, I want to clarify that our actions on the 35<sup>th</sup> Avenue Site are to protect and improve the quality of life for Alabama residents. Moving forward, I would like to reaffirm that we must improve the quantity and quality of our communications to ensure that our words and actions are well coordinated.

In this specific case, EPA strongly believes the 35<sup>th</sup> Avenue Site warrants inclusion on the NPL based on a large quantity of environmental data sampled and analyzed by EPA contractors which shows widespread contamination of residential yards with hazardous substances. We have conducted a rigorous evaluation of the risks to human health posed by this contamination and have determined that cleanup is warranted for several hundred residential properties. These decisions are consistent with decisions EPA has made on other sites in Region 4 and throughout the nation. EPA is committed to our Enforcement First principle where Potentially Responsible Parties (PRPs) conduct clean-ups. Listing the site on the NPL puts us in the best possible position to achieve a PRP-led investigation and cleanup of the site.

On June 11, 2014, I received a response from you to Region 4's request for concurrence to list the Site on the NPL. EPA understood your letter to mean that ADEM concurred on the listing, but conditioned that concurrence with the understanding that the State does not have funds available to pay the 10% cost share required for "fund-lead" remedial actions under Superfund. Region 4 has received similar "conditional concurrence" from other states in Region 4 and has always proceeded with the listing. Your conditional concurrence also references the Agency's ability to identify PRPs which the Region is proceeding on a dual track to accomplish. I certainly understand your funding concerns and you have my commitment that EPA will work closely with the State as we engage PRPs to take full responsibility for the cleanup via an enforceable agreement. Should our enforcement efforts fail and we find it necessary to request a 10% cost share from the state, we will use our flexibilities in how the state cost share is paid to the maximum extent possible.

Our efforts in this community have been discussed with members of the community, the State, congressional representatives, the Mayor and other local government representatives. We are currently responding to a community in need which has suffered disproportionately as the result of a legacy of industrial releases of hazardous constituents that have been documented as a result of our sampling in the Fairmont, Collegeville and Harriman Park communities. We strongly believe our top priority should continue to be bringing as many resources to bear as we can to improve this situation. Adding the site to the NPL sends a strong signal to the community AND to the PRPs that EPA and ADEM are willing to take the necessary steps to address the needs of the community.

I look forward to continuing to work with ADEM to improve our communications and in this effort to protect these communities.

**Heather McTeer Toney**

U.S. Environmental Protection Agency  
Regional Administrator, Region 4  
Sam Nunn Federal Bldg.  
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Atlanta, GA 30303  
404-562-8348  
[Mcteertoney.heather@epa.gov](mailto:Mcteertoney.heather@epa.gov)